Wilfred T. Leath—for Government—Direct

WILFRED T. LEATH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. MacMahon:

Q. Where do you live, Mr. Leath? A. 3734 84th Street, Jackson Heights.

Q. Where do you workr? A. I am a Special Agent of the Intelligence Division of the Treasury Department.

Q. How long have you been a special agent? A. Approximately eight and a half years.

Q. Where did you go to school, Mr. Leath? A. Pennsylvania State College.

Q. What course did you take there? A. Took a course in commerce and finance.

Q. What was your major? A. Accounting.

Q. What has been the nature of your duties—did you receive a degree from Pennsylvania State? A. Yes, sir, I received a bachelor of arts degree.

Q. What has been the nature of your duties since you have been a special agent of the Internal Revenue Bureau? A. Making investigations of tax returns.

Q. And have you done accounting work in connection with those investigations? A. Yes, sir, I have.

Q. Have you been in this courtroom during the entire trial of this case? A. Yes, sir, I have.

(1778) Q. And have you heard all the testimony? A. Yes, sir.

Q. And have you also examined all of the exhibits which have been received in evidence? A. Yes, sir.

Q. On the basis of the testimony and the exhibits have you prepared schedules showing the assets and liabilities of the Costellos on October 18, 1937 and December 31, 1945 and schedules showing their expenditures and the gross income they reported during the period from October 18, 1937 to December 31, 1945? A. Yes, sir, I have.

By Mr. MacMahon:

Q. Mr. Leath, I show you Government's Exhibits 362-A through 362-E for identification and I ask you if those are the schedules which you stated you had prepared? A. Yes, sir, they are.

Mr. MacMahon: At this time, your Honor, the Government offers Exhibits 362-E—

Withdraw that, your Honor.

Q. Mr. Leath, on the basis of the testimony and the exhibits, have you prepared schedules showing the assets of the Costellos on January 1, 1946, December 31, 1946, December 31, 1947, December 31, 1948 and December 31, 1949 and schedules showing the expenditures made and the gross income reported by the Costellos during the years 1946, 1947, 1948 and 1949? A. Yes, sir, I have.

Mr. MacMahon: Mark this 363-A.

(Marked Government's Exhibit 363-A for (1780) identification.)

The Court: 363 what?

The Clerk: 363-A.

The Clerk: You don't have a 363?

Mr. MacMahon: That is right, your Honor. That will be coming.

363-B.

(Marked Government's Exhibit 363-B for identification.)

Mr. MacMahon: Exhibit 363-C.

(Marked Government's Exhibit 363-C for identification.)

Mr. MacMahon: 363-D, two pages.

(Marked Government's Exhibit 363-D for identification.)

Mr. MacMahon: 363-D-1.

(Marked Government's Exhibit 363-D-1 for identification.)

Mr. MacMahon: 362-D-2.

(Marked Government's Exhibit 362-D-2 for identification.)

Mr. MacMahon: 363-E.

(Marked Government's Exhibit 363-E for identification.)

Mr. MacMahon: 363-F.

(1781) (Marked Government's Exhibit 363-F for identification.)

By Mr. MacMahon:

Q. Mr. Leath, I show you Government's Exhibits 363-A through E and I ask you if those are the schedules which you have just testified you prepared? A. Yes, sir, these are the schedules.

The Court: Keep your voice up, please, Mr. Leath.
The Witness: Yes.

Q. And also 363-F, is that a schedule which you said you had prepared? A. Yes, sir, I prepared this schedule.

Q. Now, Mr. Leath, assume for the period October 18, 1937 through December 31, 1945 the total increase in net worth plus the total yearly expenditures of the Costellos, less the total non-taxable receipts and less Mrs. Costello's total gross income, were made from current receipts of Frank Costello:

Are you able to compute the investments and expenditures of Frank Costello in excess of his reported gross income during that period?

Mr. Fennelly: I object to it as incompetent.

The Court: I will hear you.

Mr. Fennelly: The question is incompetent because it assumes facts not in evidence.

(1782) The Court: Overruled.

A. Yes, sir, I am.

Q. And have you prepared a schedule making such computation? A. Yes, sir, I have.

The Court: Before you give us the computation, I will hear you further, Mr. Fennelly, as to such facts as you say are not in evidence.

Mr. Fennelly: I haven't seen the schedule.

The Court: Neither has anybody else. The witness was asked a question, whether assuming certain data he could make a computation. You objected that that was incompetent because the data suggested in the question, according to your objection, is not in evidence.

Mr. Fennelly: That is right.

The Court: I ask you to explain to me what data suggested in the question is not in evidence.

Mr. Fennelly: May I see the schedule? I can tell you, I think, more clearly from looking at the schedule.

The Court: I don't know that the question has a single thing to do with the schedules.

Mr. Fennelly: All right. Then, there is no proof that any expenditures of Mrs. Costello have any relation to Mr. Costello.

The Court: Pardon me. Just a minute. Read (1783) the question, Mr. Reporter.

(Question read.)

Mr. Fennelly: It assumes, first of all, that there was an increase in net worth. It assumes that the expenditures of Mrs. Costello were from the gross receipts of Frank Costello, and no proof of it.

The Court: Overruled.

(Marked Government's Exhibit 362 for identification.)

The Court: Now, ladies and gentlemen, in view of the colloquy that was just had between counsel for the defendant and the Court and the Court's ruling, I think probably it is appropriate to say to you here that you are to draw no inferences of any kind because of any rulings that the Court makes, either sustaining or overruling an objection. Those are matters of law which are entirely outside the province of the jury, and you will be adequately instructed, if we get to that part of the case, so, therefore—I withdraw the "adequately"; I hope it will be adequate, but you will be instructed. But for the time being, it is sufficient for you to know that you are to draw no

inferences because of any rulings made by the Court. Whether something has been proved will ultimately be for you to determine. That is not (1784) my job at all; that is the job that you are here for.

By Mr. MacMahon:

Q. Mr. Leath, I show you Government's Exhibit 362 for identification and I ask you if that is the schedule which you have just testified you have prepared. A. Yes, sir.

Q. Now, Mr. Leath, assume that the corrected yearly changes in net worth, plus the yearly expenditures of the Costellos in 1946, 1947, 1948 and 1949 reflected their total current receipts in those years, are you able to compute how much those current receipts were in each of those years, based on the evidence in this case? A. Yes, sir.

Q. Now, assume that total current receipts in 1946, 1947, 1948 and 1949, less the non-taxable receipts, and less the gross income of Loretta B. Costello, as shown by the evidence, reflect the true gross income of Frank Costello in each of those years, are you able to compute how much that true gross income was in each of those years? A. Yes, sir.

Q. And have you made a schedule making both of these computations? A. Yes, sir.

(Marked Government's Exhibit 363 for identification.)

(1785) Q. Mr. Leath, I show you Government's Exhibit 363 for identification and I ask you if that is the schedule you have just stated you had prepared? A. That is for the years 1946 to 1949, inclusive.

Mr. MacMahon: Your Honor, at this time the Government offers Government's Exhibits 362 through

362-E for identification, and Government's Exhibits 363 through 363-F in evidence.

The Court: Very well.

Mr. MacMahon: Your Honor, we have photostats of these which we might hand up to your Honor at this time.

The Court: Have you got photostats for Mr. Fennelly?

Mr. MacMahon: Yes.

The Court: Very well. I shall ask one more service of you, Mr. MacMahon. Would you be good enough to have one of your very able assistants mark those with the appropriate designations?

Mr. MacMahon: I shall be happy to do so, sir.

The Court: Thank you. You need not do it now.

Mr. Pierpoint: I might point out that the letters following the exhibit numbers correspond to the schedules. In other words, when we have schedule A, that is marked A (1786) with the number. And I will put the numbers on them to keep them straight.

The Court: You put the numbers on, because that is the way I was trained. I will follow them a little bit more if you use that old fashioned system.

Mr. MacMahon: I don't know how legible on there that ink will be, your Honor (handing photostats).

The Court: That is fine. Thank you.

Mr. Pierpoint: Here is 363, your Honor (handing photostats). They are on the back of these.

Mr. Fennelly: Your Honor, I would like to cross-examine the witness preliminarily before the introduction of these schedules, and to do it with the saving of time to the Court and jury, if I could have until the morning to work on the schedules to compare them with my own notes, it would shorten my preliminary examination very much.

Colloquy

Mr. MacMahon: Your Honor, I think we should proceed along with the trial. Mr. Fennelly can cross examine preliminarily about them now.

Mr. Fennelly: Well, I would have to go into item by item from my notes, which consist of some 400 exhibits, and—

The Court: I think we will save time by (1787) spending a little of it now, Mr. MacMahon. I think so.

Mr. MacMahon: Your Honor, on the preliminary cross examination I think it should proceed now.

The Court: I am inclined to disagree with you, Mr. MacMahon. I think that we will save time. Mr. Fennelly has just got this batch of papers before him, and it is going to be pretty hard for him to keep, that is, what I am sure he wants to keep, the compass of a preliminary examination without having to look at it. And I think by giving up a half hour now we will save some time. I will allow you to do it.

Mr. Fennelly: For instance, I just wanted to point out, your Honor, for example, if in looking at the schedules I find that the figures the witness has for a certain item, there isn't any testimony on it—if I don't do that I would have to ask him about every item and go through it.

The Court: That may be so. But I take it a preliminary examination on the basis actually of each figure is not necessary. I think that all you would be entitled to in a preliminary examination would be the general theory on which it is set up. Now, that is exactly why I am giving you that time.

Mr. Fennelly: Well, there are items—

The Court: I think on cross examination, which (1788) I expect you will take, you will have your opportunity to go in and test the accuracy of the witness and of these other things; but for the admis-

sion of the testimony and so that we can move along I think all that you really ought to be permitted and all I will probably permit you to go into is the theory on which it is set up and the general segregation.

Mr. Fennelly: And whether or not items are included.

The Court: Well, whether or not certain items are included or excluded, if you think they ought to be in—

Mr. Fennelly: That is right.

The Court: —you may inquire within reasonable limits about that.

Mr. Fennelly: I happened to see one item on the first page.

The Court: I think that probably it would be time-saving to do that. And I am wondering, Mr. MacMahon, you haven't introduced the 363 series of exhibits yet.

Mr. MacMahon: I offered them all, yes, your Honor.

The Court: I thought you only offered 362.

Mr. MacMahon: No, 362 and 363.

The Court: 362 and 363. Well, I think if (1789) we were to adjourn now and let Mr. Fennelly have that extra half hour that probably we will be in better shape to conduct what I am inclined to think would be a shorter examination.

Mr. MacMahon: I understand the ruling is only for the purposes of preliminary cross examination at this time.

The Court: Oh, yes. So that I can intelligently and fairly limit it to what I think is appropriate preliminary cross examination, I think it is advisable to give the extra half hour now.

Mr. MacMahon: All right, your Honor.

The Court: Very well.

Ladies and gentlemen, we will adjourn until 10.30 tomorrow morning. And now, for your own convenience, I will tell you that on Thursday we will also adjourn at 4 o'clock. I have a hearing in another case that I will be taking up at that time, so that at 4 o'clock on Thursday we will adjourn rather than at 4.30, and you can make your plans accordingly.

Now, remember the instruction that I have given you, don't talk about the case among yourselves or with anybody else, and don't look for any information in the newspapers. You will have enough of these papers to read when they get before you, and I am quite sure that (1790) will be adequate.

10.30 tomorrow morning.

(Jury retired.)

Mr. Fennelly: If your Honor please, may I submit to you two memoranda? And I am giving the Government copies.

The Court: Yes.

I hope you won't read anything into this request I am going to make, Mr. Fennelly, in view of the memoranda that you have here in support of your motions, but I hope that somebody on your side is also giving some consideration to the matter of requests for instruction so that in case we reach that point in the trial you will be ready.

Very well.

Did you have something, Mr. MacMahon?

Mr. MacMahon: I wanted to find out when we were going to come to a decision about these requests for instruction; when they should be submitted, your Honor, by both sides. The Government is nearing the end of its case.

Colloquy

The Court: I can't tell how much longer that we will go and I am not going to ask Mr. Fennelly how much longer than that we will go except, if you have any estimate, I should like to be informed.

(1791) Mr. Fennelly: I think about all I could say to your Honor is that I wouldn't think I would be long. I really can't tell you because the situation develops from day to day.

The Court: Well, you see, that is exactly what I expected. That is not in criticism of you, Mr. Fennelly.

Mr. Fennelly: No, I understand.

The Court: I think that is probably the mark of our trade.

Mr. Fennelly: If I could tell you, your Honor, that I would take a month, I would so tell you, but I cannot.

The Court: I am sure you would.

Mr. Fennelly: But I wouldn't think that I would take long.

The Court: Very well. That is, of course, quite relative, that "long."

Let us see how we go. But I will want the requests to charge at least 48 hours before the summations, and I should appreciate them as much time before that as possible, particularly if you are going to give me a long list of requests. Of course, I am not suggesting that we require consideration of those matters but we have to be prepared for them.

(1792) But since you cannot give me any better estimate then it won't be long, I hope it won't be too long after the appointed time that I get the requests.

Mr. MacMahon: Your Honor, I am afraid I am still a little in the dark about when we are supposed to submit them.

Colloquy

The Court: So am I. If you can help me to fix a more definite time, I will be very grateful to you.

Mr. MacMahon: What I want to be sure is, we comply with your Honor's request. If you want them tomorrow, we will have them; if you want them tomorrow night, we will have them. As it is, I don't know exactly when your Honor does want them.

The Court: I want them as soon as I can get them. That answers your problem. I don't want to press you for it, though, nor do I want to have you get them in before you have all the testimony in the case here, but if you have any part of your requests ready, I should be glad to have you submit them to me, and with leave to submit such supplemental requests as you think appropriate later on.

Mr. MacMahon: Do I understand that the requests are to be exchanged—

The Court: Yes.

(1793) Mr. MacMahon: —with defense counsel?

The Court: They are.

Mr. MacMahon: In that event, I would like to wait until such time as we may exchange them mutually.

The Court: Oh, yes.

Mr. Fennelly: If you give them to the Court without giving them to me, so the Court would have them—

The Court: You wouldn't raise any question about that?

Mr. Fennelly: No.

Mr. MacMahon: Then I'll be happy to get them to you as soon as they are finished with leave, of course, to submit supplemental requests in case—

The Court: Oh, yes, I pointed that out to you. The situation from day to day may change.

(Adjourned to May 5, 1954, at 10.30 a.m.)

Colloquy

(1794) New York, May 5, 1954,
10:30 a.m.

(Trial resumed)

(The following proceedings were had in the absence of the jury:)

The Clerk: If there are any witnesses present in the court room at this time, they will please retire to the witness room.

Mr. MacMahon: Your Honor, we have Agent Sohn with us this morning, who will be a witness but who is an agent working with us on the case.

The Court: Yes.

Mr. MacMahon: In connection with this preliminary cross examination relative to the admissibility of these schedules, your Honor, it seems to us that that preliminary examination, since it has to do solely with the question of admissibility, is something that properly might be conducted in the absence of the jury.

The Court: Do you desire to be heard on that, Mr. Fennelly?

Mr. Fennelly: I apologize, your Honor. I was (1795) working with Mr.—

The Court: Mr. MacMahon suggests that your preliminary examination, since it has to do merely with the question of admissibility, should be conducted in the absence of the jury.

Mr. Fennelly: Oh, I would think not, because—

The Court: Well, you object to it, I take it?

Mr. Fennelly: Yes.

The Court: I would think it of very doubtful validity to conduct any cross examination in a criminal trial in the absence of the jury.

Mr. MacMahon: Well, I merely pose it to your Honor.

The Court: Well, we have now spent five weeks on this case and I think it would be very imprudent to run any such risk as conducting any part of the examination in the absence of the jury. I will overrule your suggestion.

Call in the jury.

(Jury in box)

The Court: Good morning, ladies and gentlemen.

WILFRED T. LEATH; resumed.

Preliminary Cross Examination by Mr. Fennelly:

Q. Mr. Leath, are you a certified public accountant? (1796) A. No, sir, I am not.

Q. And the schedule of net worth that you prepared as of October 18, 1937, for Mr. and Mrs. Costello, Government's Exhibit 362, is it, for identification, or 3, if your net worth figure for Mr. and Mrs. Costello is incorrect, all of your computations are incorrect, are they not?

Mr. MacMahon: Your Honor, I object to it—

The Court: Sustained.

Mr. MacMahon: —as improper preliminary cross examination.

The Court: I think that is improper for preliminary cross examination, Mr. Fennelly. You are going now to a question of weight which I think is improper. You may inquire of the witness, in pre-

liminary examination, as to how he went about setting this up, but you may not go into the merits of the exhibits. You will have adequate time, of course, for that in the regular cross examination, and I am limiting you now only insofar as preliminary cross examination is concerned.

Q. Now, on Exhibit 362, on the first page, where you have under a heading "Assets October 18, 1937, cash in banks," you have one item of $1,154.31. A. Yes, sir.

(1797) Q. Now, how much cash did Mrs. Costello have in the West 86th Street Branch of the Corn Exchange Bank on that—

Mr. MacMahon: Your Honor, I object to that.

Q. —from any—

Mr. Fennelly: Excuse me. I haven't finished the question.

Q. (Continuing) —from any exhibit or testimony in evidence in this case?

Mr. MacMahon: Your Honor, I object to the form of the question—

The Court: Sustained.

Mr. MacMahon: —at this time on preliminary cross.

The Court: Sustained.

Q. Does the figure cash in banks shown on Exhibit 362 include the cash in an account of Mrs. Costello at the West 86th Street Branch of the Corn Exchange Bank as of October 18, 1937?

Mr. MacMahon: The same objection, your Honor.

The Court: No, I will allow that.

A. It is my understanding that the account at the Corn Exchange Bank, at the Hudson River Branch, was—

Mr. Fennelly: I move to strike out his understanding. I am asking him, your Honor, whether (1798) it includes any cash in the West 86th Street Branch of the Corn Exchange Bank in Mrs. Loretta Costello's account as of that date.

The Court: Yes. The answer to that, it seems to me, would be yes or no or you don't know.

Q. Yes or no. A. No.

Q. Now, then, you have an item "Currency on hand," and you have a figure $30,000. What does that represent? Mr. Costello's cash on hand or Mrs. Costello's cash on hand? A. That represents Mr. Costello's cash on hand.

Q. And where have you reflected in this statement Mrs. Costello's cash on hand on October 18, 1937? A. Our investigation failed to reveal that she had any. Therefore, it is not reflected on the statement.

Q. So you don't know whether or not Mrs. Costello had cash on hand on October 18, 1937?

Mr. MacMahon: Your Honor, I object to that—

The Court: Sustained.

Mr. MacMahon: —as improper cross examination.

The Court: Mr. Fennelly, it seems to me rather clear that what you propose to do in this preliminary cross examination is to conduct a general cross examination and I do not propose to permit you to do that.

(1799) Mr. Fennelly: I will reframe the question, if I may, your Honor.

The Court: That question has been answered, so we need not go over it again. I am just trying to give you a little admonition.

We took a recess yesterday afternoon at 4 o'clock to give you adequate opportunity to go into the matters which I think you and I would agree generally are appropriate for gross examination. It seems evident to me now, from the drift of your questions, that you intend to conduct a general cross examination.

Mr. Fennelly: No.

The Court: And that you may do only in the regular time, and I think it is appropriate for me now to warn you that I am going to adhere to that order of proof.

Q. The currency on hand, then, on Exhibit 362, does not include any—

The Court: I will stop that question right there because you are merely repeating what you have got into before, and it is an argumentative question.

Q. And in the assets as of October 18, 1937, does the value—is the value of a Cadillac car reflected, yes or no? A. No, sir.

Q. Is the value of the Kastel partnership as of (1800) October 18, 1937, that is, Mr. Kastel's interest in it, is that reflected? A. Yes, it is.

Q. And would you tell me how you arrived at the value?

Mr. MacMahon: I object to that,—

The Court: Sustained.

Mr. MacMahon: —as improper preliminary cross examination.

The Court: Sustained.

Q. And will you tell me whether or not you have reflected in the assets Mr. Costello's interest in the assets of Bayou Novelty Company as of October 18, 1937?

Mr. MacMahon: Your Honor, same objection.

The Court: No, I will allow that, whether he had or not. The answer will be yes or no.

Mr. MacMahon: No testimony that he had any interest in Bayou.

The Court: Well, I assume this witness, who prepared this, knows that.

Mr. Fennelly: No testimony? I can show you at least one exhibit in evidence with some on.

The Court: All right; argument comes at a different time in the case.

Let us go along now. I have ruled the witness may answer the question.

(1801) Repeat the question, Mr. Reporter.

(Question read)

The Court: I suggest you reframe the question this way:

Have you indicated in this schedule any interest of the defendant Costello in the Bayou Company?

The Witness: The only interest reflected in this schedule, of Mr. Costello's interest, in the Bayou Novelty Company is through the figure shown for his interest in the Phil Kastel partnership.

The Court: Very well.

Q. You haven't reflected any interest of Mr. Costello in the assets of Bayou Novelty Company through Mr. Kastel as of October 18, 1937.

Mr. MacMahon: I object to that.

The Court: Sustained.

Q. Do the schedules that you have prepared, Exhibits 362 and 363, include all of the receipts of Mr. and Mrs. Costello during the years indicated? Yes or no. A. I am not quite sure I understand your question.

Mr. Fennelly: Would you read the question?

(Question read)

A. Yes, they do.

Q. Now, would you show me where is reflected the return of the Stein investment? Remember the man from (1802) Saratoga.

Mr. MacMahon: Your Honor, I object to that question.

The Court: I will allow it.

A. For purposes of this schedule—

Q. Would you just show me the place on the schedule where the return—

The Court: Shorten it up a little bit. There was testimony here by a man who said that there was an investment made sometime—I have forgotten what the year was. Will you refresh me on that?

The Witness: 1942, your Honor.

The Court: 1942, and that at the end of the season

there was some money paid back to the defendant.

You are being asked, is that money that was returned reflected on here.

The Witness: It is not specifically reflected, no, sir.

Q. And the proceeds from the sale of the Southold property of Mrs. Costello, would you show me where the item of proceeds is reflected under your schedule? A. On schedule—under Schedule E, sir, we have—

Q. Would you show me? Would you point—

The Court: Is it in that schedule?

Q. Would you point out the item? (1803) A. The item specifically is not in the schedule.

Mr. Fennelly: That is all I want to know.

The Court: Is it accounted for in any other way in the schedule?

The Witness: Yes, sir.

The Court: That is all. I just wanted to know if it is.

Q. Is the item of the return of the $9,500 by Mr. Wolf to Mr. Costello in November, 1945, in connection with the tax lien that was going to be purchased and was not, is that item specifically referred to in your schedule? A. No, sir.

The Court: Is it accounted for in any other way?

The Witness: It is accounted for, sir, in that—

The Court: That is all. I just want yes or no.

The Witness: Yes.

The Court: With respect to the 1942 item, which was the investment in the—I think the witness described it as a venture in Saratoga—

The Witness: Yes.

The Court: —is that accounted for in some way in these schedules?

The Witness: It is not specifically accounted for, sir.

(1804) The Court: All right.

Q. Now, there was an assessment made by the Government on Mr. Costello and Mrs. Costello for the years 1941 and 1945, was there not? A. Yes, sir.

Q. And is the amount of the additional income assessed included in the item "Gross income reported" on your Schedule 362? A. No, sir.

Q. Or is it included in the gross income of Loretta? A. No, sir.

Q. Now, the amount of additional—

Mr. Fennelly: Well, perhaps your Honor would rather have me defer that until we—

The Court: I don't know what you are going to ask, but I would request that you defer anything other than strict preliminary cross examination.

Q. So that the amount of income assessed to the Costellos for the years 1941 through 1949 is not reflected on your Schedule 362? A. These figures reflect the gross income reported on the original return.

Q. But my question is—

The Court: All right. Now, you have enough in there. That is enough on that.

Q. Now, my question is—

Mr. MacMahon: Your Honor, I object to that.

(1805) The Court: You know what the question

is; he answered it before. We don't need any more on that, Mr. Fennelly, at this time.

Mr. MacMahon: Your Honor, may I submit that this whole line of questioning is outside the scope of preliminary examination?

The Court: You and I apparently don't agree on that, but I am the one that has to call it, and I am doing the best I can. I don't object to you disagreeing with me, but you will have to be patient with me and let me allow what I think is appropriate.

Mr. Fennelly: All right, your Honor.

The Court: Very well.

Mr. Fennelly: I object to the introduction of Schedules 362 and 363, first for the reason that there has been no basis shown in this case for the use of a net worth method of computing income. The witness Murphy, a certified public—

The Court: I have your point on that. What is your next point? You need not argue that point.

Mr. Fennelly: And that the schedules do not reflect all of the assets as a starting point of the defendant or of Mrs. Costello, and there are items on here that I would like specifically to call to your Honor's attention, which I think we had better do at the (1806) bench, descriptions of items, and that the schedules do not reflect the cash available to the Costellos for spending during the period involved.

The Court: All right, I will withhold decision until you indicate what there is in the descriptions which you think is improper.

(Conference at the bench between Court and counsel off the record)

(Following proceedings at the bench out of the hearing of the jury:)

Mr. Fennelly: I object to Schedule 363, the caption "Unreported gross income of Frank Costello," because it assumes the very question that the jury is to determine as to whether or not the expenditures over receipts constituted income or were expenditures from capital.

Under the heading "Total Gross Income," there is a heading "True Gross Income Frank Costello" —I object to that for the same reason. And also that it assumes everything in this schedule is accurate and complete, whereas the witness has already developed that they have no information as to the net worth of Mrs. Costello at the beginning period.

Also, to the last line, quote heading "Unreported gross income—Frank Costello;" in that it states as a (1807) fact to the jury the very issue that the jury is to determine in this case.

I think that is all.

The Court: Now, I am going to overrule the objections and I am going to permit the receipt of these schedules in evidence. However, in view of the point that you make about these captions I think that the time to instruct the jury about them is right now and to explain to them that that is the Government's claim that these moneys represent that, but that whether they do or not is the issue which the jury will have to determine, if the issue is submitted to the jury. I propose to do that now.

Mr. Fennelly: Well, your Honor, in my judgment I do not believe that is adequate, and I say this with all deference to your Honor.

The Court: Yes, I know that.

Mr. Fennelly: It is perfectly easy to put a correct statement on the schedules, without any implication, to state that these are expenditures over and above the receipts, and that will clearly indicate to the jury what it is. Now, they are the ones to determine, but by the time they get to the jury room and see these schedules they see that is what it is, unreported income, and I think it is highly prejudicial.

(1808) The Court: Well, I don't think so. With the appropriate instruction, I think the theory is pretty clear to the jury. I don't think that the heading that you suggest is inaccurate, but I think that this suggestion here, which the Government agrees to, will be adequate, and at least I propose to do it now.

Now, I think these are the originals (indicating).

Mr. Fennelly: Have I seen those?

Mr. Pierpoint: Yes.

The Court: 363. That is part of 363.

Mr. Fennelly, before you go, in light of the fact that I am going to make this explanation to the jury, I do not see any reason why, Mr. MacMahon, you ought not at least consider modification of this heading here. I think it is all right, but if I were in your position I would consider modifying the heading.

Mr. MacMahon: May we have five minutes to do just that, your Honor?

The Court: Yes.

(A pause)

The Court: Mr. Fennelly.

(Mr. Fennelly came to the bench and there was a conversation between the Court and Mr. Fennelly off the record.)

(A pause)

(1809) (Further conference at the bench between Court and counsel off the record.)

(The following proceedings were had in open court:)

The Court: Now, so that we can go along, the objection is overruled and the exhibits are going to be received, but there will be an amendment with respect to the schedule which as it now reads is as follows, quote: "Unreported gross income of Frank Costello," that will be amended to read "Unreported gross income of Frank Costello as claimed by the Government."

The point of that, ladies and gentlemen, is this, that this schedule we have here is a recapitulation of the testimony that has gone in. The recapitulation is made by agents of the Internal Revenue Department, and it represents the Government's claim that moneys that the defendant is alleged to have spent over and above income which has been reported represents additional income which he should have reported and paid a tax on, rather than any capital expenditure.

The reason that heading is being modified is that it is for you, if the case is submitted to you, to determine whether or not it was in fact income on which a tax was due.

The witness is not allowed to usurp your (1810) function and make the determination that it was income; that is for you to find, if you do find it, on the basis of the evidence. All this represents is the Government's claim as to what the evidence shows.

So that you will not take this heading as a fact already established; you will understand throughout that that is the Government's claim, and they will argue to you that you should find that to be the fact, but you will be free not to find it if you think the evidence does not support such a finding.

Mr. MacMahon: Your Honor, may we have your indulgence a few minutes so that we can make appropriate changes on the photostatic copies?

The Court: Maybe the jury would like to go out and have a smoke, like I would. We will do that.

(Recess)

(Jury present)

Mr. MacMahon: Your Honor, at this time we hand to the jury photostatic copies of these schedules so that they may follow the examination.

The Court: Yes.

The corrections have been made?

Mr. MacMahon: Yes, your Honor.

Direct Examination by Mr. MacMahon (Continued):

Mr. MacMahon: (To the jurors) You will have (1811) to share these with your neighbor.

We will withhold the second schedule, your Honor, until we come to that.

Q. Mr. Leath, referring to Government's Exhibit 362 for identification and the supporting schedules A through E, which are stapled to it now, the schedule 362, which is the top schedule, labeled at the top "Investments and Expenditures of Frank Costello in excess of his reported gross in-

come as claimed by the Government, net worth expenditure method," and you have two dates on there, 10-18-37 and 12-31-45.

Under the assets column there is an item, first, "Cash in banks, $1,154.31," and as of December 31, 1945, that asset, cash in banks, has increased to $29,506.71, and over at the right you have Schedule A. A. Yes, sir.

Q. You refer there to the second schedule of this series, is that right? A. Yes, sir.

Q. Would you tell me where you derive the figure shown under the first column, October 18, 1937, $1,154.31? A. The figure of $1,154.31 is the balance in the account of Loretta B. Costello at Corn Exchange Bank and Trust Company as of October 18, 1937.

Q. Where did you derive the figure on the other bank accounts shown under the date of December 31, 1945? (1812) Take them item by item, please, Mr. Leath. A. The figure of $29,506.71 is the total of the following balances in bank accounts—

Q. Keep your voice up just a little. A. (Continuing) Corn Exchange Bank and Trust Company, Loretta B. Costello, $4,444.61; Corn Exchange Bank Trust Company, Frank—

The Court: Pardon me. Is that a figure that you got from Exhibit 69 in evidence?

The Witness: Yes, sir.

A. (Continuing) —Corn Exchange Bank Trust Company, Frank Costello, $19,917.05.

Q. You get that from Exhibit 40 in evidence? A. That is right, sir. Central Savings Bank, $4,101.65; Port Washington National Bank, $1,043.40. For a total of $29,506.71.

Q. You get those last two items from Exhibit 80 and 72 in evidence, is that right? A. That is right.

Q. Let us go back to the first schedule. You have an item here "Currency on hand," under October 18, '37, $30,000. Where did you get that item? A. Exhibit 23, which is the statement that Mr. Costello gave to former special agent Ronayne, in which he stated that his currency on hand at 10-18-37 (1813) was $30,000.

Q. Your next item—

Mr. Fennelly: I object to the statement of the witness from the exhibit because the statement to Mr. Ronayne said "approximately."

Mr. MacMahon: He said 25 to 30.

Mr. Fennelly: He said 25 and 30 thousand dollars.

Q. You took the larger of those two figures, is that right? A. That is right, sir.

Q. That is, to give the defendant the benefit of the doubt, is that right? A. Yes, sir.

Mr. Fennelly: I object to that because it does not exclude the possibility of being more.

The Court: Very well. Go ahead.

Q. I notice under the column "Investment," October 18, 1937, $9,500, and I notice as of December 31, 1945, those investments have increased to $158,028.31, and that that information is contained on Schedule B with respect to these investments. A. That is right, sir.

Q. So that is the third schedule, Exhibit B? A. Yes, sir.

Q. The first item there is Phil Kastel partnership, and under October 18, 1937, you state that at $9,500. From which exhibit do you get that? (1814) A. Exhibit 23.

Q. And that is the statement of Frank Costello to special agent Ronayne, is that right? A. That is right, sir.

Q. I notice the other investments as of December 31, '45,

Louisana Mint Company, $17,636.40. Where do you get that? A. That comes from Exhibit 150 and 153.

Q. Mr. Leath, referring to Exhibit 153 in evidence, I notice there are two figures on Government's Exhibit 153 in evidence, one of $17,636.40, the one you have in your schedule, and another of $22,832.87. Will you explain why you took the $17,636.40 figure? A. Louisiana Mint Company is on a fiscal year ending November 30, 1945, and, according to the books of that company, the capital account of Frank Costello as of that date was $23,261.40.

Mr. Fennelly: Excuse me. Are these books in evidence, or is the witness talking from a schedule?

The Court: He is talking from a schedule, apparently.

Mr. Fennelly: He said "the books," your Honor. I don't think the Government offered the books.

Mr. MacMahon: The ledger pages, your Honor, which support this schedule, are in evidence.

(1815) The Court: That was my recollection.

Mr. Fennelly: May I have the exhibit number?

Mr. MacMahon: The exhibit number of the schedule—

The Court: 150, 151 and 152 are the ledger pages, according to my notes, and then 153 was the schedule which the witness testified was based on those other three exhibits.

Q. Would you continue, Mr. Leath? A. The balance per the books as of November 30, 1945, was $23,261.40. The drawings of Frank Costello from that date through December 31, 1945, were $5,625, giving a balance as of December 31, 1945, of $17,636.40.

The difference between that figure and the figure of

$22,832.37 represents the accrued profit of the partnership for the one-month period of December.

Under treasury regulations, partnerships on a fiscal year—partners who are in a partnership that file on a fiscal year; are required to report their proportionate share of profits in their calendar year in which the fiscal year of the partnership ends.

Further, the profits for the entire fiscal year are generally credited to the individual partners account at the end of that fiscal year.

And, therefore, we take just the drawings (1816) from the capital account and arrive at a net figure of $17,636.40 for the investment as of 12-30-45.

Q. Now, that same thing would be true of these other partnerships shown on Schedule B, Beverley Country Club, Crescent Music Company; is that right? A. Yes, sir, that is right.

Q. And the total of those investments as of December 31, 1945, was $158,028.31, is that right? A. That is correct, sir.

Q. That includes the $52,500 investment in 79 Wall Street? A. Yes, sir.

Q. Now, these other assets, real estate, Sands Point, $30,000, you got that from Exhibit 199 and from the testimony of Mrs. Adoue, is that correct? A. Yes, sir.

Q. And the savings bonds and the money due from the police property clerk and the deposit with the New York Telephone Company are all similarly based either on exhibits or on the testimony shown under the last column on the schedule, is that right? A. That is right, sir.

Q. Those other assets total $62,525? A. That is correct, sir.

Q. Now, will you turn back? I notice the next item is loans receivable—$5,000. Did you get that (1817) from Exhibit 23? A. Yes, sir.

Q. Which was the statement of Frank Costello to Special Agent Ronayne on October 18, 1937, is that right? A. Yes, sir.

Q. Now, going to liabilities, on the first schedule, I notice an item loans payable $60,000. A. $6,000.

Q. $6,000. Mortgage payable, Sands Point, $10,684.02, making total liabilities on October 18, 1937, of $6,000 and total liabilities on December 31, 1945, of $10,684.02; is that correct? A. Yes, sir, that is correct.

Q. And the loan payable under October 18, '37, of $6,000, is based, again, on Government's Exhibit 23, the statement given by Frank Costello to special agent Ronayne; is that correct? A. Yes, sir.

Q. And the mortgage on Sands Point is based on Government's Exhibit 201, is that right? A. Yes, sir.

Q. Now, the next item you have is net worth, total net worth as of both times. How do you arrive at that figure of $39,654.31 as of October 18, 1937? A. That figure represents the difference between the assets as of that date and the liabilities as of the (1818) same date.

Q. Now, I notice in the column under December 31, 1945, a net worth of $239,376. How do you arrive at that figure? A. That figure represents the difference between the assets as of December 31, 1945, and the liabilities as at the same date.

Q. In other words, you subtract the liabilities from the assets and you arrive at that figure, is that correct? A. Yes, sir.

Q. Now, the next item is less net worth beginning of period. There you subtract the net worth as of October 18, 1937, from the net worth as of December 31, 1945, is that correct? A. Yes, that is correct.

Q. And you arrive at an increase in net worth over this period of time of $199,721.69, is that right? A. Yes, sir, that is correct.

Q. Now, you add to that yearly expenditures over that period of time, is that right? A. Yes, sir.

Q. And those total $312,007.73, is that right? A. Yes, sir.

Q. And you get those from Schedule C? A. Yes, sir.

Q. And that is a 2-page schedule consisting of (1819) nothing but the arithmetic of adding up the expenditures which have been testified to and which have appeared on exhibits in evidence; is that right? A. Yes, sir.

By the Court:

Q. And on that Schedule C, which is now Exhibit 362 in evidence, at the extreme right you have two columns under the heading "Evidence." A. Yes, sir.

Q. And under that you list the name of the witness who testified to the figures contained in the schedule? A. Yes, sir.

Q. And you give the page in the stenographer's minutes of the trial here at which that testimony appears. A. Yes, sir.

Q. And in those instances where the oral testimony of a witness was supported by an exhibit you give the number of the exhibit. A. Yes, sir.

Q. And in such instances as the testimony was not supported by an exhibit, you show a blank at that point? A. Yes, sir.

Q. For instance, I note down here on the first page of Schedule C the testimony given by some witnesses, Mr. Wolf, for instance, some of his testimony was not supported by an exhibit, and, therefore, there is a blank (1820) in the space. A. Yes, sir, that is correct.

Q. And that appears also with respect to certain other witnesses who didn't have records. A. Yes, sir.

The Court: Very well.

By Mr. MacMahon:

Q. Now, referring back to Schedule A, or to the first schedule 362, I notice the figure "Total investments and expenditures, $511,729.42." Now, what does that figure represent? A. That figure represents the total of the increase in net worth plus the yearly expenditures.

Q. And what does the total increase in net worth and yearly expenditures represent? A. That represents the total moneys expended during that year during this period from 10-18-37 to 12-31-45 for investments and expenditures.

Q. Now, I notice the next item is that you subtract non-taxable receipts of $6,421.69. A. Yes, sir.

Q. And those non-taxable receipts are shown on Schedule D. And those are the non-taxable portions of the proceeds of the New York Life insurance policy paid in 1942. A. Yes, sir.

(1821) Q. In the amount shown on the schedule? A. Yes, sir.

Q. And that is based on Exhibit 356 in evidence. Then some Sun Life Insurance Company divigends based on the exhibits shown on the schedule; is that right? A. Yes, sir.

Q. And the inheritance which Mrs. Costello received from the estate of her father, Jacob Geigerman. A. Yes, sir.

Q. So that you come out with a total non-taxable income there of $6,421.69, is that right? A. Yes, sir.

Q. And you subtracted that over on Schedule A from the total increase in net worth, plus the total yearly expenditures over this period; is that right? A. Yes, sir.

Q. And you arrived at a figure of $505,307.73 as that total, is that right? A. Yes, sir.

Q. What does that figure then represent? A. That fig-

ure represents the total of the increase in net worth plus the yearly expenditures, less non-taxable receipts during the period.

Q. Now, I notice that the next item you subtract is the gross income of Loretta Costello. A. Yes, sir.

Q. And that is based on Schedule E, is that right? (1822) A. Yes, sir.

Q. And on Schedule E you list all the reported income of Frank and Loretta Costello in each of the years 1938 through 1945; is that right? A. Yes, sir.

Q. And over in the right-hand, next to the right-hand column you total the reported income of Loretta Costello; is that right? A. Yes, sir.

Q. And that is $32,925.05? A. Yes, sir.

Q. And those figures are based on the income tax returns filed, is that right? A. That is correct, sir.

Q. Now, would you explain why that figure is subtracted? A. That figure is subtracted in order that we can arrive at the gross income reported by Frank Costello.

I am sorry. That figure is subtracted in order that we may arrive at the total gross income of Frank Costello for this period 10-18-37 to 12-31-45.

Q. Would you explain the method how you arrived at that as total gross income of Frank Costello?

Mr. Fennelly: This is as claimed, as claimed by the Government on the assumption of facts.

The Court: Yes.

A. The figure of $472,382.68 represents the increase (1823) in net worth plus the yearly expenditures, less non-taxable receipts, less gross income of Loretta Costello for the period 10-18-37 to 12-31-45.

Q. But how do you arrive at that as gross income of Frank Costello? A. Because we have eliminated the net

worth that he had on hand at the beginning of the period, we have eliminated his non-taxable receipts, and we have eliminated the gross income of Loretta Costello for the entire period.

Q. Now, do your net worth computations automatically take care of drawings from the accumulations on hand at the beginning of the period? A. Yes, sir.

Q. I notice the next item here is gross income reported of Frank Costello, and again that is based on Schedule E, which, as we have seen with the case of Mrs. Costello over in the third column from the left, total of gross income, $269,516.87, that is, the total gross—total income reported of Frank Costello during this period; is that right? A. That is the total gross income reported during this period, yes, sir.

Q. And that is taken from his income tax returns, is that right? A. Yes, sir.

Q. Now, you subtract that figure from the total, (1824) previous total, and what do you arrive at, Mr. Leath? A. You arrive at the investments and expenditures of Frank Costello in excess of his reported gross income.

Q. And those are $202,865.81 over this period, is that right? A. Yes, sir.

Q. How do you determine that those were not from prior accumulated savings? A. That is determined by the fact that in the computations we have given credit for the net worth at the beginning of the period and, in addition, the non-taxable receipts received during the period and the gross income of Loretta Costello and Frank Costello have been deducted.

Q. And that is according to the Government's claim? A. Yes, sir.

Mr. Fennelly: Just a minute. I move to strike it out, your Honor, because, from the witness's testimony, he has already admitted

The Court: I don't hear you.

Mr. Fennelly: The witness—I move to strike out his answer. The witness has already admitted on a preliminary examination that they did not have information to determine what Mrs. Loretta Costello's cash on hand was at the beginning period.

The Court: Overruled. You may argue that; you (1825) may cross examine further on it at the appropriate time.

All right, go ahead.

Q. Is the cash on hand for Mrs. Costello of $1,154.31 the only cash you were able to find in your investigation?

Mr. Fennelly: Just a minute. The schedule does not say cash on hand; it says cash in the bank.

Q. Was that the only cash you were able to find, Mr. Leath? A. Yes, sir.

The Court: Now, maybe this would be a good time for us to take our regular recess. We kept the jury out longer than they would be ordinarily the earlier time. We will take a little recess now, ladies and gentlemen.

I take it you are going into 363 now?

Mr. MacMahon: No, your Honor. I am going into the omitted assets from this schedule.

The Court: All right. We will take a recess.

(Recess.)

Q. Mr. Leath, Mr. Fennelly asked you about the Cadillac. Would you explain how you handle that on your schedule? A. In 1941 Mrs. Costello purchased a new Cadillac. At that time she traded in the car that she—?

Mr. Fennelly: Excuse me, your Honor. My (1826) question was directed to 1937.

Q. Would you refer to your expenditure schedule, Mr. Leath, and explain how you treated that Cadillac on the evidence in this case, Schedule C.

Mr. Fennelly: It is not explanation of whether it was included as an asset on October 18, 1937, which was my question.

The Court: Yes, all right.

A. The Cadillac that was on hand at 10-18-37 was traded in in 1941 on a new Cadillac. At that time allowance of $250 was made, and in computing our expenditure for the purchase of a new car, we have allowed $250 trade-in value against the total cost.

Q. Was any money—what was the cost of that car as shown by—in 1937, as of the 1937 Cadillac? A. I don't have the cost of the '37 Cadillac here.

The Court: Is it claimed that this car was purchased in 1937?

Mr. MacMahon: May I have that exhibit, please?

The Court: Or that it was merely possessed in 1937, Mr. Fennelly?

Mr. Fennelly: Possessed, as far as the evidence shows.

The Court: Possessed?

Mr. Fennelly: That is right. My question was (1827) relating, in other words, when setting up a net worth statement, as to the value put on that, was it included at all, and the witness said it wasn't.

Mr. Pierpoint: The evidence shows that the Cadillac was purchased in 1936.

The Court: Yes.

Mr. Pierpoint: It was turned in in 1941.

Q. Mr. Leath, I refer you to Government's Exhibit 277 in evidence—

The Court: Just a minute. Let me see 277. Isn't that the item that was—277, yes. Very well.

Q. Are you able to state from Government's Exhibit 277 what the Cadillac in the possession of Costello on October 18, 1937, cost in 1936? A. $4,468.

Q. And when it was turned in in 1941, what was allowed on the car? A. $250.

Q. Was any of the money represented by the difference of those two figures available to Costello or to Mrs. Costello to spend? A. No, sir.

Q. And that is the reason, is it, that you omitted it from the schedule as an asset on hand? A. Yes, sir.

Q. As to the Joe Stein venture in Saratoga, that does not appear on your schedule. Would you explain why that is so? (1828) A. The investment in the Joe Stein venture was made in this period and it was liquidated in this period. Therefore, it doesn't have to be specifically identified.

Further, we haven't included in the expenditures or the investments the investment itself, nor have we included the return of the investment. The profit from the investment, if there was any, is included in the tax return and that profit is reflected through the schedule.

Q. In other words, that investment was made and liquidated within one year, is that right? A. Yes, sir.

Q. Money had to be spent to make the investment and you get the money back in the same year? A. Yes.

Q. Does that affect in any way the net worth? A. No, sir.

Q. The Bayou Novelty Company, is that interest reflected on your schedule? A. Only as reflected through the Phil Kastel partnership.

Q. I notice that that is not reflected on December 31; 1945. Why is that? A. Because the Bayou Novelty Company was liquidated in 1939. Testimony during the trial was to the effect that at the end of 1938 (1829) the partners' accounts showed minus balances.

Q. There was a deficit in the capital account, is that it? A. That is correct.

Q. So that no money came out of that? A. No, sir.

Mr. Fennelly: I object to that and move to strike it out. It has nothing to do whether money came out. There was a deficit. A lot of money might have come out before and that was why there was a deficit in the capital account.

The Court: You may argue that.

Q. I notice that Pelican Novelty Company is not on that schedule. Why is that? A. Pelican Novelty Company was an investment made and liquidated within this period and, therefore, has no effect on the net worth for the entire period.

Q. Mr. Leath, Mr. Fennelly asked you about $9,500 that Costello had given to Wolf to purchase a tax lien, which was returned in the same year to Costello. Why isn't that on the schedule? A. Because the money was given and returned on that within the same period.

Q. The Southold lot, is that reflected in your schedule? A. It is reflected in the schedule through the tax return, yes, sir.

(1830) Q. The tax return of Loretta B. Costello, is that right? A. Yes, sir.

Mr. MacMahon: Your Honor, may I pass the next schedule?

The Court: Yes. You had better pick up the old ones.

(Jury handing photostats to Mr. MacMahon.)

(Mr. MacMahon hands photostats to the jury.)

Q. Now, Mr. Leath, I refer you to Government's Exhibit 363 in evidence through 363-F in evidence, and this schedule is a schedule unreported gross income of Frank Costello as claimed by the Government under the net worth expenditure method from 1946 to 1949, inclusive? A. That is right, sir.

Q. And those are the indictment years? A. Yes.

Q. I notice on the schedule the item "Cash in banks as of January 1, 1946, $29,506.71." I notice that the next year, as of the end of December of 1946, the item is $19,675.69; that the—let us go down the first column.

Cash in banks $29,506.71, January 1, 1946. You get that from Schedule A, is that right? A. Yes, sir.

Q. We turn now to Schedule A. Would you tell us what cash in banks make up the figure which you have just (1831) testified to? A. Balances—

Q. Keep your voice up. A. Balances in the Corn Exchange Bank and Trust Company, account of Frank Costello, $19,917.05; Corn Exchange Bank and Trust Company, Loretta B. Costello, $4,444.61; Port Washington National Bank and Trust Company, $1,043.40; Central Savings Bank, $4,101.65. For a total of $29,506.71.

Q. And those are based on the bank records which are the exhibits shown in the last column, is that right? A. Yes, sir.

Q. And that total is shown as the cash in banks on January 1, 1946, on your first schedule? A. Yes, sir.

Q. $29,506.71? A. Yes, sir.

Q. I notice an item, "Real Estate, $30,000." A. Yes, sir.

Q. And again you take that from Schedule A? A. Yes, sir.

Q. And what is that item on Schedule A? A. That is the residence at 5 Bakers Point Road, Sands Point, New York.

Q. And again from testimony and an exhibit in evidence, is that right? A. Yes, sir.

Q. Now, I notice the item Investment—$158,028.31, (1832) and that is from Schedule B. What investments make up that item? Would you read those off? A. Louisiana Mint Company partnership—$17,636.40.

Beverley Country Club partnership—$60,000.

Crescent Music Company partnership—$27,891.91.

79 Wall Street Corporation—$52,500.

For a total of $158,028.31.

Q. Those, again, are based on the testimony from the stand or exhibits in evidence, is that right? A. Yes, sir.

Q. Now, with respect to those partnerships, did you do the same there with respect to fiscal years as you did in the earlier schedule? A. Yes, sir.

Q. And for the same reasons? A. Yes, sir.

Q. Now, in January 1, 1946, there are no loans receivable; is that right? A. No, sir.

Q. Now, there are other assets $32,525. shown on Schedule B. A. Yes, sir.

Q. Would you turn to Schedule B, Mr. Leath? And, what are those other assets on January 1, 1946? A. United States Savings Bonds, $5,175; due from police property clerk, police department, New York City, $27,200. Deposit with New York Telephone Company, $150. For a total of $32,525.

(1833) Q. And so the total assets as of January 1, 1946, adding up all those items, comes to $250,060.02, is that right? A. Yes, sir.

Q. Now, under Liabilities, there is no liability to Frank Erickson as of that date on your schedule, is that right? A. That is right.

Q. There is a liability with respect to the mortgage at Sands Point? A. Yes, sir.

Q. And what does that figure represent, $10,684.02? A. That is the balance due on the mortgage for the residence at Sands Point, New York.

Q. At that date? A. At January 1, 1946.

Q. Now, your next figure is Net Worth $239,376. How did you arrive at that? A. The figure of $239,376 is the difference between the assets as of January 1, 1946, and the liabilities as of the same date.

Q. In other words, you subtracted the liabilities, the total liabilities, from the total assets and you arrive at net worth, is that right? A. Yes, sir.

Q. Now, we go to 1946.

The Court: December 31, 1946.

Mr. MacMahon: December 31, 1946.

The Court: The last figure being a figure for the date January 1, 1946.

(1834) Mr. MacMahon: Yes.

The Court: That is the beginning of the first of the prosecution years.

Mr. MacMahon: That is right, your Honor.

Q. And now we are at the end of the first prosecution year, December 31, 1946; is that right, Mr. Leath? A. Yes, sir.

Q. Now, Cash in Banks is down to $19,675.69. You take that from Schedule A, again, is that right? A. Yes, sir.

Q. Now, what items make up that? A. Balance in the account of Frank Costello, Corn Exchange Bank and Trust Company, $7,714.43.

Balance in the account of Loretta Costello, Corn Exchange Bank and Trust, $6,622.54.

Balance in Port Washington National Bank Trust Company, $772.83.

Balance in Central Savings Bank, $4,565.89.

For a total of $19,675.69.

Q. Now, that decrease from the first of the year to the end of the year, does that represent withdrawals from the bank? A. Yes, sir.

Q. Now, the next item is the real estate. Is that the Sands Point real estate? A. Yes, sir.

Q. And there is no change in that? A. No, sir.

(1835) Q. Now, the next item is Investments, $109,477.92, and you take that from Schedule B, is that right? A. Yes, sir.

Q. Would you tell us about those investments? A. The investments as of December 31, 1946: Louisiana Mint Company partnership, $16,721.65.

Beverley Country Club, Inc., $8,000.

Crescent Music Company, partnership, $32,256.23.

79 Wall Street Corporation, $52,500.

For a total of $109,477.92.

Q. I notice the figure is less than the one that you began the year with. A. Yes, sir.

Q. Why is that? A. The interest in the Louisiana Mint Company partnership decreased, the interest in the Beverley Country Club when it changed from a partnership to a corporation decreased, and that accounts principally for the decrease in the two years.

Q. Now, I notice in here an item "Loans Receivable, $74,819.51" on the first schedule, the fourth item down, under Assets, is that right? A. Yes, sir.

Q. What does that represent, referring now to Schedule B, the third sheet? A. That represents loans receivable in the amount of $59,819.51, from the Beverley Country Club, Inc., and $15,000 in Loans Receivable from the Crescent Music (1836) Company partnership. For a total of $74,819.51.

Q. Now, we have Other Assets in the amount of $31,775 shown on the first schedule, is that right? A. Yes, sir.

Q. Now, where do you get those? A. From Schedule B.

Q. The third sheet, again. A. Yes, sir. That is United States Savings Bonds in the amount of $4,425.

Due from police property clerk, police department New York City, $27,200.

And deposit in the New York Telephone Company $150.

Q. And the total of those gives you your figure of $31,775 on the first schedule of Other Assets, is that right? A. Yes, sir.

Q. So that the total assets for the period at the end of December, 1946, are $265,748.12, is that right, Mr. Leath? A. Yes, that is right.

Q. Now, under Liabilities, referring to the first schedule under Liabilities, Loans Payable, Frank Erickson, $25,000. A. That is correct.

Q. What is that based on? A. That is based on Exhibit 281 and 282.

Q. And the mortgage payable at Sands Point, it has (1837) now gone down to $9,914.51, is that right? A. Yes, sir.

Q. And that reduction is caused by paying off the mortgage, or part of the mortgage that year, is that right? A. Yes, sir.

Q. So the total liabilities as of the end of 1946 were $34,914.51, is that right? A. That is correct.

Q. Now, from that you subtract the net worth at the beginning of the period, is that right? A. You subtract,—

Q. First you arrive at the net worth—I am sorry, Mr. Leath. How do you arrive at the figure Net Worth? A. The figure of Net Worth of $230,833.61 represents the assets on hand as of December 31, 1946, in the amount of $265,748.12, less the liabilities as of the same date of $34,914.51.

Q. Now, I notice you have an item Less Net Worth at the beginning of the period. A. Yes, sir.

Q. So you subtract the net worth as of January 1, 1946, from the net worth of December 31, 1946, and you arrive at a minus figure of $8,542.39, is that right? A. Yes, sir.

Q. Now, will you explain that minus figure? A. Well, the net worth at the beginning—at the (1838) end of the period is less than the net worth at the beginning of the period, which indicates that some of the assets that were on hand at the beginning of the period were drawn upon to—for some other purpose.

Q. Now, I notice you have a corrected yearly change in net worth. A. Yes.

Q. I take it there were no adjustments in the year 1946, is that correct? A. That is correct.

Q. And the next item is Plus Yearly Expenditures. A. Yes, sir.

Q. How much is that? A. $77,693.49.

Q. And what does that item come from, and what does it represent? A. That comes from Schedule D, and it represents the moneys expended during the year 1946.

Q. Schedule D is three pages, is that right, Mr. Leath? A. Yes, sir.

Q. And that is the arithmetical total of the expenditures which have been either testified to from the witness stand or from an exhibit in evidence? A. That is correct, sir.

Q. For the year 1946? A. Yes, sir.

Q. Now, I noticed your next item is Total Current Receipts, $69,151.10. How do you arrive at that? A. The

figure of $69,151.10 represents the decrease in the net worth from January 1, 1946, to December 31, (1839) 1946, plus the yearly expenditures for that year, and his current receipts because we have taken out previously the assets and liabilities or net worth as of the beginning of the period.

Q. In other words, you have accounted for drawings on prior accumulations, as shown by your computation; is that right? A. Yes, sir.

Q. So that these moneys came, according to the Government's theory, from current receipts?

Mr. Fennelly: I object to that, your Honor.

The Court: I think I will sustain it. I think that is an inaccurate summary. I wonder if you mean that. It came, anyway, from receipts, but according to the Government's theory it came from receipts or whatever assets the defendant had.

Q. Is that right, Mr. Leath? A. No, this would be total current receipts, because in the calculation up above we have given credit for the net worth on hand as of the beginning of the period.

Q. You mean you have given credit for withdrawals from assets on hand at the beginning of the period, is that right? A. Yes, sir.

Mr. Fennelly: Net worth is calculated by the Government in these schedules.

The Court: Yes. Well, that is inherent in all of this. (1840) All of these figures are what the Government claims the testimony up to now shows.

All right, let us get along.

Q. Now, I notice the next item is Less Non-taxable re-

ceipts, and you have an item there of $137.60. Where did you get that? A. That comes from Schedule E.

Mr. MacMahon: (To the jury) This is the last schedule. The next-to-the-last schedule.

The Court: The next-to-the-last page. It is one of the narrow pages.

Q. And that item of $137.60 represents a dividend from the Sun Life Insurance Company? A. That is right, sir.

Q. Which is not taxable income? A. Right.

Q. So you subtract that out, is that it? A. Yes, sir.

Q. Now, going back to the first page, the next item is Total Gross Income. What is that figure? A. $69,013.50.

Q. And how do you arrive at that, Mr. Leath? A. The total gross income represents the decrease in net worth plus the yearly expenditures, less the non-taxable receipts received during the year.

Q. Now, I notice you subtract from that the gross (1841) income of Loretta B. Costello of $15,864.36. Is that correct? A. Yes, sir.

Q. And that is based on Schedule—is it F? I can't see it. A. Schedule F.

The Court: Now, just pause there a minute. I seem to have been shortchanged here. I don't seem to have a copy of F. See what you can do for me on that.

(Document handed to the Court.)

The Court: Thank you.

Q. Would you read that figure and tell us how you arrive at it from Schedule F? Which column is it? A. The figure of $15,864.36 is in the fourth column, about

halfway down the page, and it is called Loretta Costello Gross Income Reported, Crescent Music Company, $15,864.30, Exhibit 5.

The Court: That is 36 cents, is it not?
The Witness: 36 cents.

Q. And that is based on the income tax returns and on the checks from Crescent Amusement Company? A. Yes, sir.

Q. Crescent Music Company.

The next item is the True Gross Income, Frank Costello, as claimed by the Government, $53,149.14. How do you determine that? A. That is determined by taking the net worth at (1842) the beginning of the period, subtracting from it the net worth at the end of the period, which in this year represents—which in this year resulted in a minus figure; adding to that minus figure the yearly expenditures, subtracting the net—non-taxable receipts, subtracting the gross income of Loretta B. Costello, and arriving at true gross income, Frank Costello, as claimed by the Government for the year 1946.

Q. How did you determine that that was gross income under the Government's claim, Mr. Leath? A. We determined that because we had been given credit at the beginning of the period for the net worth as of that date, as of January 1, 1946.

Q. What he had on hand at the beginning of the period, is that right? A. Yes, sir.

Q. And for what he drew out of it? A. Yes.

Q. Plus what he spent; is that it? A. Yes, sir.

Q. I notice the next item is less the gross reported income by Frank Costello, $35,049.35. Where do you get that item? A. That comes from Schedule F.

Q. The last schedule, Schedule F, is that right? A. Yes, sir.

Q. And that item is based on his income tax returns filed, is that right? A. Yes, sir.

(1843) Q. And you subtract that from the true gross income as claimed by the Government on the first schedule, is that right? A. Yes, sir.

Q. And what do you arrive at? A. Unreported gross income, Frank Costello, as claimed by the Government, $18,099.79.

Q. How do you determine that that is gross income, under the Government's theory, Mr. Leath? A. It is determined that it is gross income in that credit has been given for the net worth on hand as of January 1, 1946, and taking into account the net worth as of December 31, 1946, and it was determined that a negative figure was arrived at; to that was added the yearly expenditures and from it was subtracted the non-taxable receipts and gross income reported by Loretta Costello and the gross income reported by Frank Costello.

Q. In other words, you have given him credit for all income reported, is that right? A. Yes, sir.

Q. And you subtracted that from the total of the increase in net worth and the expenditures, is that right? A. Yes, sir.

Q. And you arrive at a figure which the Government claims was unreported income? A. Yes, sir.

(1844) Q. And you account for all drawings from prior savings by the net worth computations, is that right? A. Yes, sir.

Q. Mr. Leath, again referring to the same schedule, the first schedule, 363, and moving on to the year 1947, the items there of Cash in Banks, Real Estate, Investments, Loans Receivable, Other Assets, total $265,748.12. Is that right? A. No, that total is $306,264.08.

Q. How did you arrive at that figure? A. That is the total of all the assets contained in this column marked December 31, 1947.

Colloquy

Q. And those totals, cash in banks, were made again as they were in the preceding year from the balances in those banks at the end of the year as shown on your Schedule A, is that right? A. Yes, sir.

Q. On the Real Estate, there was no change in that? A. No.

Q. Is that right? A. No, sir.

Q. And that is the Sands Point property, is that right? A. Yes, sir.

Q. And the investments have gone up a small amount, is that right? A. Yes, sir.

Q. And those are computed in the same way as (1845) in the preceding year on Schedule B, is that right? A. Yes, sir.

Q. The loans receivable have increased to $91,105.30. Would you explain that? A. That is found on Schedule B. The increase in the Loans Receivable from $74,819.51 as at December 31, 1946, to $91,105.30 as at December 31, 1947, is accounted for by the fact that the loan receivable from the Crescent Music Company was transferred to the Crescent Music Company, Inc. and increased by $11,285.79.

In addition, another loan was made to the Consolidated Television Distributing Corporation in the amount of $5,000.

And the Loans Receivable from the Beverley Country Club, Inc. of $59,819.51 remained the same.

Q. Now, going back to the first item, Cash in Banks, there is an increase there from $19,675.69 to $71,112.13, is that right? A. Yes, sir.

Q. And that is from Schedule A? A. Yes, sir.

Q. And what is the reason for that increase? A. In 1926 the balance in the account of Frank Costello was $7,714.43. At the end of 1947 it was $62,356.48.

The balance in the account of Loretta B. (1846) Costello at the end of 1946 was $6,622.54. That particular account decreased to $3,971.59 at the end of 1947.

Port Washington National Bank, balance at the end of 1946 was $772.83. That account decreased to $149.44 at the end of 1947.

The account at the Central Savings Bank had a balance of $4,565.89 at the end of 1946, and increased to $4,634.62 at the end of 1947.

The total of the bank balances as of the end of 1947 was $71,112.13.

Q. Under the item Loans Payable, Frank Erickson, that has increased by December 31, 1947, to $50,000, is that right? A. Yes, sir.

Q. And that is based on Exhibits 281 and 282, is that right? A. Yes, sir.

Q. And the mortgage payable at Sands Point has gone down about another $800? A. Yes, sir.

Q. Down to $9,109.65? A. Yes, sir.

Q. And the total liabilities are $59,109.65? A. Yes, sir.

Q. At the end of 1947? A. That is correct.

Q Now, what was the yearly change in net worth in 1947, Mr. Leath, and how did you arrive at it? A. By subtracting the net worth—

(1847) Q. What was the yearly change, first? A. Yearly change in the year 1947 was $16,320.82, which represented an increase.

Q. What was the net worth at the end of 1947? A. Net worth at the end of 1947 was $247,154.43.

Q How did you arrive at that net worth? A. That net worth was arrived at by subtracting the liabilities on hand as of December 31, 1947, from the assets on hand as of the same date.

Q. And the change in net worth during that year was $16,302.82, is that right? A. $16,320.82.

Q. And that is an increase in net worth this year, is that right? A. Yes, sir.

Q. I notice you have an item Adjustments, $9,715.98. A. Yes, sir.

Q. From Schedule C. Would you turn to Schedule C and tell us what that represents and how you arrived at that figure? A. The figure of $9,715.98 represents Mrs. Costello's distributive share of the operating loss on Crescent Music for the fiscal year ending in 1947. This loss is reflected in her capital account, and, therefore, the capital account being part of the assets on net worth, further, since this decrease in the asset didn't make any further money available during this year, an adjustment was made in order that (1848) you could correctly arrive at the true funds available during the year 1947.

Q. Let me see if I understand that, Mr. Leath. There was a loss in Crescent Music, is that right?

Mr. Fennelly: I object to that. Excuse me. I object to leading the witness, your Honor. I think the explanation should come from the witness, who is an expert accountant.

The Court: Overruled.

Q. There was a loss in Crescent Music that year, is that right? A. Yes, sir.

Q. And Mrs. Costello's share of that loss was $9,715.98, was that right? A. Yes, sir.

Q. But that loss was money lost: it didn't make any money available to spend, is that right? A. Yes, sir.

Q. It was deducted on the income tax return for the year? A. Yes, sir.

Q. But it was not a case of drawing on an asset to get some money to spend, is that right? A. That is right.

The Court: That is pretty obvious.

Q. And so you add it back to the yearly change in net worth to compensate for that, is that right? A. Yes, sir.

(1849) Q. So you arrive at a corrected yearly change net worth, $26,036.80, is that right? A. Yes, sir.

Q. Add to that the yearly expenditures of $76,477.66, is that right? A. Yes, sir.

Q. And those are based on Schedule D, is that right? A. Yes, sir.

Q. And Schedule D is the total of the expenditures testified to or shown by exhibits in evidence, is that right? A. Yes, sir.

Q. For that year? A. Yes, sir.

Q. Then you arrive—what did you do with these total yearly expenditures after you had determined them, Mr. Leath? A. The total yearly expenditures are added to the corrected yearly changes in net worth.

Q. And what do you arrive at? A. Total current receipts for the year 1947, $102,514.46.

Q. How do you determine that those are total current receipts and not withdrawals from accumulated funds or savings or assets on hand at the beginning of the year?

Mr. MacMahon: As shown by the Government's schedule.

The Court: Yes.

(1850) A. That is determined because, in the beginning calculation, we have given credit for the net worth on hand as at the beginning of 1947 in the amount of $230,833.61.

Q. You subtract from the total current receipts the non-taxable receipts in the amount of $42.62. A. 60 cents.

Q. 60 cents. From Schedule E. What kind of item would that be, Mr. Leath? A. That item represents a dividend received from the Sun Life Assurance Company during the year 1947 and is non-taxable.

Q. Going back to the first page, your next item is Total Gross Income. What is that figure? A. $102,471.86.

Q. And that is for the year— A. 1947.

Q. How did you determine that? A. It was determined by giving effect to the net worth on hand as of the beginning of 1947 and subtracting it from the net worth as of December 31, 1947, and adding to that figure the adjustments as explained in Schedule C and yearly expenditures less non-taxable receipts received during the year.

Q. How did you determine that that is gross income and not drawings from prior savings? (1851) A. Because a credit has been given to the net worth on hand as of the beginning of 1947.

Q. I notice you have an item Less Gross Income of Loretta B. Costello, but there is no figure in the year 1947; why is that? A. The joint tax return filed by Mr. and Mrs. Costello for the year 1947 did not reflect any gross income for Mrs. Costello.

Q. And the next figure is True Gross Income, of Frank Costello, as claimed by the Government, $102,471.86, is that right? A. Yes, sir.

Q. How did you determine that figure? A. That figure was determined by giving effect to the net worth on hand as of the beginning of 1947, subtracting that net worth from the net worth as of December 31, 1947, computing the adjustments and making them, adding the yearly expenditures, less non-taxable receipts, less—that is as far as this particular year goes.

Q. Then you subtract the gross income reported by Frank Costello in the amount of $36,376.49, is that right? A. No, sir. That figure is $36,673.49, yes, sir.

Q. And you determined that from Schedule F, which was made up from his income tax return for that year, (1852) is that right? A. Yes, sir.

Q. And you arrive at a result of how much as unreported gross income of Frank Costello, ~~as~~ claimed by the Government in the year 1947? A. $65,798.37.

Q. How did you determine that, on the Government's

theory, was gross income? A. It was determined by giving effect to the net worth on hand at the beginning of 1947, subtracting that worth, net worth, from the net worth on hand as of the end of 1947, making the necessary adjustments, adding the yearly expenditures, less non-taxable receipts, less gross income reported by Frank Costello in 1947.

Mr. MacMahon: Your Honor, may we suspend now?

The Court: Yes, we will recess now for lunch.

Two-fifteen.

Ladies and gentlemen, remember the instructions, don't talk about the case.

(Recess until 2.15 p.m.)

(1853) Afternoon Session

(Jury in box.)

Wilfred T. Leath, resumed.

Direct Examination by Mr. MacMahon (Continued):

Q. Referring, Mr. Leath, to Government's Exhibit 363 for the year 1948, what was the corrected yearly change in net worth for that year? A. $23,064.94.

Q. And the yearly expenditures for that year? A. $59,414.43.

Q. And the unreported gross income, as claimed by the Government? A. $37,120.97.

Q. Were those computations made, just as we have seen with the earlier years, from those subsidiary schedules based on testimony and exhibits? A. Yes, sir.

Q. And for the year 1949, what was the corrected yearly change in net worth for that year? A. $1,167.55.

Q. And that is an increase, is that right? A. Yes, sir.

Q. And what were the yearly expenditures for that year? A. $96,091.71.

Q. And the unreported gross income for that year, (1854) as claimed by the Government? A. $37,832.04.

Q. And were those computations made the same way as the earlier years which we went over this morning, based on those schedules which in turn are based on testimony and exhibits in evidence? Is that right? A. Yes, sir.

(Government's Exhibits 364 and 364-A marked for identification.)

Q. Now, Mr. Leath, assuming that the gross income of Frank Costello for each of the years from 1946 through 1949 was as shown on Government's Exhibit 363 in evidence, are you able to compute the net income for those years based on the evidence in this case? A. Yes, sir.

Mr. Fennelly: I object to it as incompetent.

The Court: Overruled.

Q. And have you prepared a schedule showing such computation? A. Yes, sir, I have.

Q. I show you Government's Exhibit 346-A for identification and ask you if that is the schedule of your computation of net income. A. 364.

Q. 364. A. Yes, sir.

Q. And 364-A? A. Yes, sir.

Mr. MacMahon: At this time, your Honor, the Government offers Exhibits 364 and 364-A.

(1855) Mr. Fennelly: I object to this, your Honor. The figures on here are higher than those charged in both the indictment—

The Court: I don't hear you.

Mr. Fennelly: The figures charged in here are higher than in both the indictment and in the bill of particulars.

The Court: I will hear you.

Mr. MacMahon: May I have just a moment to look at the indictment?

The Court: Oh, yes.

Mr. MacMahon: In 1946 the figure is lower than in the indictment.

The Court: The figure in the indictment for 1946; the net income, is $36,630.54.

Mr. MacMahon: Yes. The proof shows it to be lower.

The Court: Very well. How about 1947?

Mr. MacMahon: The same thing is true, your Honor, as to the year 1947.

The Court: 1948?

Mr. MacMahon: The same thing is true, your Honor, as to the year 1948.

The Court: Yes. And 1949?

Mr. MacMahon: And the same thing is true, your (1856) Honor, as to the year 1949.

Mr. Fennelly: The gross, your Honor, in the schedule before which I objected to on the same basis—

The Court: I don't hear you.

Mr. Fennelly: The gross in the exhibit before is higher.

The Court: Let us take one objection at a time. The objection that you just made now as to the exhibits now offered, which are 364 and 364-A, on

the ground that there is an increase in the net income as claimed by the Government above what is stated in the indictment, is overruled.

Mr. Fennelly: Now I object, your Honor, and move to strike out the exhibit 363 on the ground that the gross income as shown by the schedule is greater in each year than the bill of particulars.

The Court: Read that objection to me again, Mr. Reporter.

(Record read.)

Mr. Fennelly: Here is the exhibit, if you would like—

The Court: I have 363. Overruled.

(Marked Government's Exhibits 364 and 364-A in evidence.)

Q. Mr. Leath, I show you Government's Exhibit 364—

(1857) Mr. MacMahon: Oh, your Honor, I have copies of these. May I pass them to the jury?

The Court: Yes. Better collect 363 first.

Mr. Fennelly: I also object to the statement on the first line under the years—

Mr. MacMahon: We will amend that in accordance with the schedule this morning. We intended to, but through an oversight we didn't.

The Court: Very well.

Mr. MacMahon: As claimed—

The Court: You will add to that, "as claimed by the Government."

Mr. MacMahon: Yes, your Honor.

The Court: Suppose you do that right now? It shouldn't take you too long to do it.

(A pause.)

(Mr. MacMahon hands photostats of Exhibits to the jury.)

Q. Now, Mr. Leath, referring to Government's Exhibit 364 in evidence, would you state the true net income of Frank Costello, as claimed by the Government, as shown on your schedule for the year 1946? A. $25,214.67.

Q. And for the year 1947? A. $54,045.70.

Q. And for the year 1948? A. $47,570.37.

(1858) Q. And for the year 1949? A. $54,657.06.

Q. Now, I notice in this schedule, on the left-hand column, the list of deductions per the income tax returns. A. Yes, sir.

Q. Those are taken from the income tax returns, is that right? A. That is correct, yes, sir.

Q. Then I notice the next item is less deductions not claimed on the return. A. Yes, sir.

Q. And what are those? A. Those represent expenditures which have been placed in evidence for which Mr. Costello is entitled to a deduction.

Q. Which was not claimed on his return? A. Not claimed on the original returns, no, sir.

Q. But which the Government claims are allowable, nevertheless? A. Yes, sir.

Q. And the footnote, you are allowing additional interest on your schedule that was not claimed; is that right? A. Yes, sir.

Q. And the Exhibit 364-A, what is that, Mr. Leath? A. That is a computation of the sales tax on the various expenditures bought from people doing business within the City of New York.

Q. What was the basis of that? A. Well, the basis was that on all items purchased within the City a certain sales

tax is due, and the (1859) taxpayer is entitled to a deduction for whatever sales tax was paid.

Q. And you have given him credit for that deduction? A. Yes, sir.

Mr. MacMahon: You may examine, Mr. Fennelly.

Cross Examination by Mr. Fennelly:

Q. Mr. Leath, these schedules that you have prepared, Government's Exhibits 362, 363 and 364, are based on a net worth of Mr. and Mrs. Costello as of October 18, 1937; were they not? A. Yes, sir.

Q. And if you are incorrect in the net worth of Mr. and Mrs. Costello as of those dates, all of your schedules are incorrect; is that right? A. Only to the extent of the error, yes, sir.

Q. And when you have testified that these schedules were based upon the Government theory or claim, that claim is that the expenditures of the Costellos over and above income, that is, reported income, came from some source that the Government claims as income rather than expenditures of assets or non-taxpayer income? A. That is correct.

Mr. MacMahon: Your Honor, I object to the form of that question.

(1860) The Court: He has answered it and he says it is correct.

Q. Now, will you tell me what exhibit or testimony in evidence would show the bank balance in Mrs. Costello's account at the Corn Exchange Bank, West 86th Street Branch, on October 18, 1937? A. I believe, sir, there is an exhibit which indicates that this account was transferred.

to the account—that the present account at the Corn Exchange Bank was transferred from the 86th Street Branch.

Mr. MacMahon: Are you referring to Government's Exhibit GG?

Mr. Fennelly: How much help does the witness need? He is an expert. I doubt if he needs your assistance, although he may.

Q. Would you tell me the exhibit from which you can determine the bank balance in Mrs. Costello's account at the West 86th Street Branch of the Corn Exchange Bank on October 18, 1937? A. I believe there were two exhibits that would help me answer that question, sir.

Q. And one you think is Lord & Taylor letter? A. That is one of them, sir.

Q. From the Corn Exchange Bank. And the other is (1861) Mrs. Costello's signature card, which I think is Government's Exhibit 20—43, I think.

Mr. MacMahon: 42 (handing).

Mr. Fennelly: 42.

Q. Now, on Exhibit 42, which is Mrs. Costello's signature card opening a new account on September 7, 1937, the material you are referring to is down in the left-hand corner behind the printed words "Introduced by," where it states a check— A. Own check.

Q. —own check on West 86th Street branch of the Corn Exchange Bank; that means on Mrs. Costello's account at that branch of the bank: right? A. Yes, sir.

Q. Now, what was the balance in Mrs. Costello's account on September 7, 1937, the date that check was drawn in the West 86th Street branch of the Corn Exchange Bank? You do not know, sir, do you? A. Not the exact balance, sir.

Q. You do not know any balance, do you? A. Well—

Q. If you do, will you produce the exhibit in evidence that states the balance in that account on that day? A. Well, it would be a balance there, sir, equal to the amount of the check to open this account.

(1862) Q. Well, now, do you know that the balance in that account was not $9,000 on that day? A. No, sir, I do not.

Q. Now, the truth is, Mr. Leath, that you do not know at all what the balance was; isn't that the truth? A. That is the truth, sir, except that I would—

Q. That is all. That is the truth.

Mr. MacMahon: Let the witness answer. Your Honor, he is entitled to give a full answer.

Mr. Fennelly: Once he said that is the truth, that is all I need.

Q. And you could not tell us, Mr. Leath, either, could you, how much money Mrs. Costello had withdrawn from that West 86th Street branch of the Corn Exchange Bank up to September 1, 1937? A. No, sir.

Q. How many checks that she had cashed and kept the cash during 1937 up until September? A. No, sir.

The Court: You mean if she kept—if she did that.

Mr. Fennelly: That is right.

The Court: I thought your question suggested that to be the fact.

(1863) Mr. Fennelly: I do not know. I am asking the witness if he doesn't know.

The Court: But I just want to make clear what was in the question, and you were merely suggesting a hypothesis and not the fact.

Mr. Fennelly: That is right.

The Court: Very well.

Q. Now, then, the next item on Exhibit 362—

Mr. Fennelly: Have you the original exhibit there?

Q. Now, the next item on Government's Exhibit 362 is Currency on Hand, and you have an item of $30,000, which you testified was Mr. Costello's amount, and that you got that from the statement that he made to Mr. Ronayne, which I think is Government's Exhibit—

The Court: 23.

Q. —23; that is right, is it? A. Yes, sir.

Q. Now, what was the amount of Mrs. Costello's cash on hand on that day, do you know? A. No, sir.

Q. You do not know whether it was $50,000, $100,000? A. No, sir.

Q. Then coming to the item of investments, which is the next one, $9,500, is that right? A. Yes, sir.

(1864) Q. And that, I believe you told us, was the investment of Mr. Costello in what? A. Phil Kastel partnership.

Q. In the 1939 statement of Mr. Costello to the grand jury, didn't he then tell the—in answer to the question—that the amount he had put in was $15,000? A. I am not certain whether he said the amount he put in was 15 or that the amount he had in at that time was 15.

Q. Didn't he say, actually, that the amount was 15, that he had put in back in 1935? A. I don't recall the exact question and answer.

Mr. Fennelly: May I have the exhibit?

The Court: 30, is it?

Wilfred T. Leath—for Government—Cross

(A pause.)

Mr. Fennelly: I put a clip on here so I would find it but it has come off.

(A pause.)

Q. I refer you to Exhibit 30, question, this is a question to Mr. Costello,

"Q. How much did you put in? A. I put in around $15,000.

"Q. When did you put that in? A. In the early part of 1935."

Now, you did not give the figure $15,000 on that (1865) schedule, did you? A. No, sir.

Q. Now, then, let us still look at the same item that you did not fix at $15,000, but only $9,500.

Mr. Fennelly: Could I have Exhibit 14, please?

Q. (Questioning) In 1937, in the income tax of Mr. Costello, he reported how much income from the Phil Kastel partnership, some $66,000, was it? A. $66,461.94.

Q. And that amount is in turn reflected on the Kastel partnership for the fiscal year ending in 1937, is it not? A. Yes, sir.

Q. What exhibit or what testimony is there in evidence to show the date that Mr. Costello received that $66,000-odd from Mr. Kastel? A. I believe Mr. Minniaci testified that his examination of the books and available records of Bayou indicated that there had been a distribution of all moneys in the capital account and all moneys invested prior to October 18, 1937.

Q. A distribution from Bayou? A. Yes, sir.

Q. What I want to know is, from Bayou it went to Mr. Kastel, didn't it? A. Yes, sir.

Q. My question to you, sir, was what exhibit or what testimony is there in evidence to show when Mr. (1866) Kastel paid that money to Mr. Costello? A. There is none, sir.

Q. And the Mr. Minnaci that you speak of is the man who lost, or stray, or mislaid the pages, his transcript about Bayou, just three weeks before he took the witness stand; is that the man? A. There were certain records he said he couldn't find, yes, sir.

Q. And he was one of the Government agents? A. Yes, sir.

Q. Now, if this 66,000-odd dollars from Kastel to Mr. Costello was not paid prior to October 18, 1937, it should be included in the net worth, shouldn't it?. A. That would depend on whether or not he had it on hand at that time, sir.

Q. It would depend solely, sir, on the date that Mr. Kastel paid it to Mr. Costello in fact, wouldn't it? A. That is right, yes, sir.

Q. And if Mr. Kastel had not paid the 66,000-odd dollars to Mr. Costello prior to October 18, 1937, it should be included in the net worth, shouldn't it? A. Mr. Costello was asked what his receivables were, sir—

Q. Will you answer the question yes or no? A. Yes.

(1867) Q. And you do not know whether or not—when that money was paid, do you? A. No, sir.

Q. And you haven't included that $66,000 in the net worth, have you? A. I did not know it existed at this particular time, sir.

Q. Now, would you tell me whether or not you have included—

Mr. Fennelly: I withdraw the question.

Wilfred T. Leath—for Government—Cross

Q. I see that under the heading, on Exhibit 362, for October 18, 1937, "Other Assets," you have a blank. A. Yes, sir.

Q. Now can you tell us what were the—what was the value of the assets of the Bayou as of that day. And if you would, refer me to any exhibit.

Mr. MacMahon: Your Honor, I object to that question.

The Court: Sustained. The testimony, Mr. Fennelly, as I recall it, is that Mr. Costello, the defendant here, was not a partner in Bayou.

Mr. Fennelly: Your Honor, he was

The Court: That he was a partner of Kastel.

Mr. Fennelly: Of Kastel. He had a half interest in Mr. Kastel.

The Court: Half interest in Kastel.

Mr. Fennelly: He had a half interest in Mr. (1868) Kastel's interest. So if you are certainly trying to arrive at a net worth, you must include all of the assets of someone, and if you exclude an interest, you are not arriving at a true net worth statement.

The Court: I agree with the principle, but as I recall the testimony, and I may be wrong, and it is on the basis of that recollection that I make the ruling here, the testimony was quite clear that the defendant had a half interest in Kastel.

Mr. Fennelly: That is right, and Mr. Kastel had an interest in Bayou. So, therefore, Mr. Costello had half of the interest of Mr. Kastel's—.

The Court: I am not sure that that follows.

Mr. Fennelly: —interest.

The Court: I am not sure that that follows.

Mr. MacMahon: The testimony was clear, in both 1937 and 1939, by the defendants that he had no in-

terest in Bayou; that his only interest was in Phil Kastel.

Mr. Fennelly: Your Honor, his interest is through Kastel, and, therefore, he has an interest in the assets of Bayou. He has half of Kastel's.

The Court: Very well.

Mr. Fennelly: So, to arrive at a true and accurate net worth statement, we must have what that (1869) interest is.

The Court: I suppose you are certainly entitled to submit that and argue it. I will allow the question.

Mr. Fennelly: Would you read the question?

(Record read.)

A. I don't know, sir.

Q. And isn't it also true that you can't even tell us what the assets of Bayou were as of that date? A. I don't know what the assets were on that date, no, sir.

Q. Now, isn't it a fact that, to arrive at a net worth statement, you must include a value as of the date that you are arriving at the schedule at, all of the assets of whosever net worth you are trying to arrive at?

Mr. MacMahon: I object to the form of that question.

The Court: Well, it is a little involved.

Mr. Fennelly: Well, I think maybe I can try again and do a little better.

The Court: All right. One strike.

Q. Isn't it a fact that in arriving at a net worth statement you must include a value for every asset? A. Generally speaking, yes, sir, there are some assets that can be treated differently.

(1870) Q. Well, now, let be ask you, isn't it a fundamental principle of accounting that every asset and every liability must be reflected; isn't that right? A. Yes, sir.

Q. And if they are not reflected your statement is not accurate, is it? A. If they are treated in some other manner, the statement still would be accurate, sir.

Q. Well, if they are omitted, it would not be accurate, would it? A. It still would be accurate, sir, if they were treated in another manner.

Q. Let us take a very simple proposition: I own nothing in the world but a Cadillac on October 18, 1937, what is my net worth, and I have no liabilities? A. Whatever the value of the Cadillac is.

Q. Now, you have omitted the value of the Cadillac in your October 18, 1937, list of assets, have you not? A. Yes, sir.

Q. And is it so that you have made sort of a hybrid of these schedules partly on an asset basis and partly on a cash basis? A. No, sir; as a matter of practice it will be found that an asset such as an automobile which is held from year to year and traded in at a certain point is not picked up at the original cost value and carried at that cost value from year to year; rather, at the time (1871) a new car is purchased, the value of the car, the original car, at that time is allowed against the purchase price and the expenditure for the new car is reduced by the amount of that allowance.

Q. You are speaking about 1941; I am speaking about 1937. A. You asked me, sir, how I would treat it.

Q. What I want to find from you is—

The Court: Wait a minute. My recollection of your testimony, Mr. Witness, is that you said that there was a practice under which the procedure, which you have just described, was followed.

Wilfred T. Leath—for Government—Cross

The Witness: Yes, sir; we follow it in income tax cases, yes, sir.

The Court: The question of Mr. Fennelly is whether or not an asset on a given date must not be—whether it must not be reflected as of some value or no value. I think we are getting off into an excursion here. I don't purport to know what the right answer is, but I can see that we are drifting off here away from what we are on trial about, and I don't think—what I am trying to say to you is that I don't think that last answer was responsive to Mr. Fennelly's question.

Suppose you start over.

Q. Mr. Leath, all I am trying to get at is, isn't it so that to have a true net worth statement you must (1872) include every asset? A. Yes, sir.

The Court: Is it also true, Mr. Leath, that a Cadillac automobile had some value, great or little, on October 18, 1937?

The Witness: Yes, sir.

The Court: Very well.

Q. And as a matter of fact, that car, according to your testimony this morning from the exhibit, had been purchased, I believe, in 1936? A. That is correct, sir.

Q. At something over $4,000; is that right? A. I believe the exact figure was 4400 and something.

Q. Now, Mr. Leath, on Exhibit 362—that is the one before you; correct? A. Yes, sir.

Q. (Continuing)—you have an item Gross Income Reported by Frank Costello and that is up until, from November 18th, rather October 18th, 1937, to December 31, 1945? A. Yes, sir.

Wilfred T. Leath—for Government—Cross

Q. Of some $269,516.67? A. Yes, sir.

Q. Now, in 1953 there was an assessment made on Mr. Costello for the tax year 1941, 12 years before, wasn't there? A. Yes, sir.

Q. And that was done pursuant to a waiver that (1873) Mr. Costello had given to the United States Government?

Mr. MacMahon: Your Honor, I object to this line of testimony, assuming facts not in evidence; it doesn't put the assumption in the question.

The Court: I don't hear you.

Mr. MacMahon: I object to the question, your Honor; it assumes facts not in evidence, without making it clear that they are assumptions of Mr. Fennelly's.

The Court: I don't recall any testimony about that.

Mr. Fennelly: I am asking the witness if it isn't so. And the next thing I will ask—

The Court: I thought you were stating it.

Mr. Fennelly: I will ask Mr. MacMahon if he would please produce the waiver.

Mr. MacMahon: What waiver are you referring to?

Mr. Fennelly: The waiver of Mr. Costello letting the Government assess him in the year 1953 all the way back to the year 1941.

Mr. Pierpoint: Your Honor, we have certain waivers downstairs. I don't understand what a waiver letting the Government assess anybody is.

Mr. Fennelly: I think the witness can answer the question very simply, your Honor.

Mr. Pierpoint: The Government assesses.

(1874) Mr. Fennelly: —without all this. I think the witness knows.

Mr. MacMahon: The characterization of it, your Honor, I was not aware that the Government ever had people let them do anything.

Q. Mr. Leath, could you tell us whether or not—

The Court: Do you know, Mr. Leath, whether or not in connection with any assessment that was made in 1953 and as a part of the proceedings pursuant to which the assessment was made, there was filed a waiver by the defendant?

The Witness: Yes, sir.

The Court: Very well. Have you any way of describing it other than that?

The Witness: Waiver, sir, is just what it means.

The Court: No. I say, have you any other way of identifying it, which is probably what I should have said instead of "describing" it. Now, does that sufficiently describe it for the Government so that the request Mr. Fennelly makes may be complied with?

Mr. Fennelly: Your Honor, I don't need it now: All I wanted was the fact from the witness, that is all.

Q. And the additional amount of income assessed to Mr. Costello for the year 1941 was the sum of (1875) $19,116.28, was it not? A. According to this information, yes, sir.

Q. And that is a sheet on the Treasury Department, is it not? A. Yes, sir.

Q. I wonder if you would take a pad and add these figures for me as we go along.

(Clerk hands pad.)

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Q. That is $19,116.28 for the year 1941. Now, for the year 1942 there was an assessment made in 1953 on Mr. Costello's 1942 income of an additional amount of $17,134.34 47 cents.

The Court: Are you stating that or are you asking the witness if he knows?

Mr. Fennelly: I am referring the witness to the assessment sheet here of the Government's.

The Court: In evidence?

Mr. Fennelly: No, it is not in evidence.

The Court: I hadn't thought so.

Mr. MacMahon: That is exactly my objection.

The Court: You may ask him what he knows. If you want to put in some document from which you desire to read, you may do that.

Q. Do you know whether these figures—

The Court: But you can't do something in between.

(1876) Q. Do you know these figures, Mr. Leath, from your investigation of this case? A. This, sir, I believe is a revenue agent's report, not prepared by me.

The Court: No. The question is do you know whether or not is is a fact that in the year 1953 the Government; in effect, said that the defendant had under-reported his income in 1942, and that the income was in fact later than he had said it was; and that they assessed a tax against him for the excess amount?

The Witness: Yes, but I don't know whether these are the exact figures.

Colloquy.

The Court: Very well.

Mr. Fennelly: Now, will the Government produce the assessments for the years 1941 through 1945?

Mr. MacMahon: Your Honor I submit that anything after—that is, done after the prosecution year of 1949 has no relevance or materiality to this case. If your Honor rules otherwise, we will be happy to do so.

The Court: I would be inclined to disagree with you on that. I say, I disagree with you on that.

Do you have the papers that Mr. Fennelly asked for?

Mr. MacMahon: They are downstairs, I believe, your Honor. We will produce them.

(1877) The Court: Very well.

Mr. Fennelly: Would your Honor like a case on that subject, on the assessment? I happen to have one handy, if you wish me—

The Court: I am always glad to have a case, Mr. Fennelly.

Do you have that here, or do you have to send down for it?

Mr. MacMahon: I have to send down for it, sir. We will get it during recess, your Honor.

The Court: Very well.

Had you planned your cross examination to go along this line, Mr. Fennelly, or would it inconvenience you to—

Mr. Fennelly: Yes, it would very much inconvenience me.

The Court: Very well. We can take our recess now and you can get it.

In the meantime, let me look at the case.

Mr. Fennelly: I hand the Court a certified copy

of the opinion in the Fred Ford case against the United States in the Fifth Circuit. It is now reported but I haven't got the citation of it.

The Court: Fine. Thank you.

(Recess.)

(1878) (Jury not present.)

Mr. MacMahon: Your Honor, Mr. Pierpoint has something to say for the Government with respect to these documents. He is familiar with this phase of the case.

The Court: Yes.

Mr. Pierpoint: Your Honor, the Government, with respect to these reports, takes the same position that it took yesterday with respect to that other report.

I have the reports here. They are assessments from the year 1941 through the year 1950. They cover the prosecution years here civilly as well as these prior years that Mr. Fennelly is speaking about.

The assessments are based on the net worth expenditure method. The excess of the taxes is calculated on the basis of expenditures.

The differences in amounts are caused by the difference in the standard of proof between criminal and civil cases. The difference in years is because the prior years were barred by the Statute of Limitations criminally.

And if we are going to go into this, the Government, we believe, is entitled to develop the fact that these assessments are based on the net worth expenditure method; and there it is purely on (1879) ex

penditures, and that they are expenditures that couldn't be proved in this case because of the difference in the standard of proof between criminal and civil litigation.

Mr. Fennelly: I am only referring to the years 1941 through 1945.

The Court: Yes. Do the reports show whether or not the Government assessed a tax on additional income over and above what was reported by the taxpayer for the year 1941?

Mr. Pierpoint: Well, your Honor, there is one report that covers the years 1941, 1942, 1944, 1945 and 1946.

Mr. Fennelly: The answer is yes, your Honor.

Mr. Pierpoint: There is another report.

The Court: Does the report show that the government assessed a tax on income over and above what the taxpayer reported for the year 1941? The answer to that—

Mr. Pierpoint: Yes.

The Court: —it seems to me, is yes or no.

Mr. Pierpoint: Yes, your Honor. The answer is yes.

The Court: All right.

Let Mr. Fennelly see it.

(1880) Mr. Pierpoint: Do you desire to inspect them, your Honor?

The Court: No.

Mr. MacMahon: And they also have certain prejudicial—

Mr. Pierpoint: Yes, your Honor.

The Court: They may. I suppose that would be my job to consider anything that is objected to as prejudicial.